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Convention on the Elimination of All Forms of Discrimination against Women, including the elaboration of a draft optional protocol to the Convention

Annotated comparison of the draft optional protocol and the amendments proposed thereto with the provisions of existing international human rights instruments

Report of the Secretary-General

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Introduction

1. The Commission on the Status of Women, in its resolution 41/3 on the elaboration of a draft optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women,[1] requested the Secretary-General to submit to the Commission at its forty-second session a report containing an annotated comparison of the draft optional protocol and the proposed amendments thereto with the provisions of existing international human rights instruments, taking into account the report of the Working Group submitted to the Commission at its forty-first session.

2. In the present report, articles of the draft optional protocol[2] after completion of the first reading (hereinafter referred to as "the draft OP") and alternative texts of those articles, as applicable, are compared with the provisions of four international human rights instruments whose procedures are similar to those envisaged in the draft OP. These are the first Optional Protocol to the International Covenant on Civil and Political Rights ("the first OP"),[3] articles 20 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[4] article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[5] and article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC).[6] The Migrant Workers Convention has not yet entered into force. Aspects of both a formal and a substantive nature are noted. Reference is also made, where applicable, to the rules of procedure and practice of the respective treaty bodies and to the report of the Secretary-General containing a comparative summary of existing communications and inquiry procedures and practices under international human rights instruments and under the Charter of the United Nations (E/CN.6/1997/4), which was before the Commission at its forty-first session (hereinafter referred to as "the comparative summary").

3. Several of the articles of the draft OP, or parts thereof, remain in square brackets. The following annotations do not identify bracketed or non-bracketed text. Instead, the text elements of the draft OP and alternatives, as applicable, are compared with existing instruments.

4. The present report reflects comments on the draft optional protocol received from the Office of the United Nations High Commissioner for Human Rights and from the Treaty Section of the Office of Legal Affairs (on articles 17 to 24).

Articles 1 and 2: Competence of the Committee and standing

5. From a formal point of view, the draft OP addresses in two separate articles (articles 1 and 2) the establishment of the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to handle communications (article 1) and the question of standing – that is, who has the right to submit a communication (article 2). The other four international human rights instruments combine both aspects in a single article.[7]

6. Article 1 of the draft OP can be compared most directly with the first part of article 1 of the first OP. In both cases, the communications procedure is contained in a separate instrument – a procedural protocol – whereas in the case of CERD, CAT and MWC, the communications procedure forms part of the main instrument. In the latter case, States parties to the main instrument recognize the treaty body's competence to receive and consider communications through a declaration, rather than via ratification or accession. This aspect was also discussed in the comparative summary.[8]

7. Unlike the first OP, CAT and MWC, article 1 of the draft OP does not spell out the fact that only States parties to the Convention may become States parties to the OP, but refers simply to States parties to the present Protocol. The procedure for becoming a State party is covered in article 17 of the draft OP, which has a comparable equivalent in article 8 of the first OP. A provision common to all other instruments (namely, that no communication shall be received if it concerns a State party to the instrument which is not a State party to the OP or which has not declared that it has accepted the communications procedure)[9] is not explicitly included in the draft OP, either in article 1 or under the draft OP's admissibility criteria. It may be noted that the Secretariat receives on a regular basis communications from complainants subject to the jurisdiction of States that are not parties to, for example, the first OP. Such communications cannot be received or considered by the Committee.

8. A final text element in article 1 of the draft OP concerning the submission of communications "in accordance with article 2" has an equivalent in the opening clause of article 2 of the first OP, by which the right to submit communications is subject to the provisions of article 1.

9. Article 2 of the draft OP and the alternative formulations cover the question of standing; the requirement that the complainant(s) claim a violation of a right or that the State party has failed to give effect to its obligations under

the Convention; the question of jurisdiction; and the requirement of exhaustion of domestic remedies.

10. As to standing, article 2 of the draft OP and the alternative formulations address standing for individuals, groups or organizations as alleged victims, as well as for individuals, groups or organizations with a sufficient interest in the matter. All four comparable instruments specify that communications may be submitted by individuals; CERD extends this right also to "groups of individuals", and CAT and MWC specify that communications may also be submitted "on behalf of individuals".[10]

11. The rules of procedure and practice of the Human Rights Committee, the Committee against Torture and the Committee on the Elimination of Racial Discrimination have further clarified the meaning of these formulations and have established how and in what circumstances claims may be brought by victim(s) or on their behalf, under the various instruments. This is discussed in the comparative summary.[11] None of the existing procedures contains explicit provisions concerning the right of a claimant or claimants to be represented by counsel or another duly designated representative in the exercise of the right to submit a communication, as the formulation in alternative to 2 (b) (i) suggests. However, the rules of procedure and practice of the treaty bodies make it clear that alleged victims may be represented by duly designated representatives. This right to representation means that technically an alleged victim uses her right to submit a communication, but in practice the communication is filed by her duly designated and authorized representative, who thus speaks as the alleged victim. This right to representation differs from the submission of communications in instances where an alleged victim(s) appear to be unable to submit a communication, or to duly designate a representative. In such cases, treaty bodies have accepted communications on behalf of a victim, but have required the author to justify his/her acting on behalf of the alleged victim(s). This is also discussed in the comparative summary.[12]

12. Article 2 of the draft OP and all the alternative formulations establish the right of the claimant(s) to submit communications, stating that "communications may be submitted by ...". In contrast, each of the four other instruments approach the matter from the Committee's perspective, setting out the right of each treaty body to receive and consider communications from the claimant(s). The first OP contains both formulations, with article 1 establishing the Committee's right to receive and consider communications and article 2 establishing the right of the claimant(s) to submit communications.

13. Two options are foreseen in article 2 of the draft OP and alternative formulations as regards violation of rights/failure to comply with obligations. They are that the claimant(s) allege a violation of any of the rights set out in the Convention or that they are directly affected by the failure of a State party to comply with obligations; or, alternatively, that the claimant(s) allege a violation of any of the rights set out in the Convention. Comparable instruments require that a violation of rights be alleged in the complaint, but do not foresee failure to comply by the State party as a separate basis for a complaint.

14. Alternative 1, alternative 2 and the alternative to 2 (a) require that the claimant(s) be "under the jurisdiction" of the State party in order for the Committee to receive a communication. All existing instruments refer to the State party's jurisdiction with regard to the claimant(s). The first OP, CAT and MWC require that the claimant(s) be "subject to [the State party's] jurisdiction" and CERD that the claimant(s) be "within its jurisdiction".[13]

15. Alternatives 1 and 2 of the draft OP foresee the exhaustion of domestic remedies as an additional condition for the receipt of a communication. Other instruments address this requirement under admissibility criteria[14] and, in each case, further detail is provided as to possible exemptions from the rule. The first OP refers to the criterion of exhaustion of domestic remedies in articles 2 and 5.2 (b).

Articles 3 and 4: Admissibility criteria

16. Article 3 of the draft OP establishes that communications must be in writing and must not be anonymous. No other comparable instrument presents these two preconditions for admissibility of a communication in a single article. The criterion of non-anonymity is expressly contained in all other instruments.[15] Only the first OP[16] explicitly establishes that communications must be in written form.

17. Article 4 of the draft OP contains admissibility criteria that require consideration and decision by the Committee before it moves to a consideration of the merits of a complaint and a decision with respect to the merits.

18. Article 4 presents criteria of identical content in two alternative formats. Paragraph 1 of alternative 1 contains a criterion that needs to be assessed by the Committee before admissibility is declared. Paragraph 2 of alternative 1 contains both criteria that make a communication *prima facie* inadmissible and criteria that need to be assessed

before a decision on admissibility is made. Alternative 2 lists all admissibility criteria under a single chapeau, without drawing a distinction between *prima facie* inadmissibility and declaration of inadmissibility following examination.

19. Both alternatives incorporate a number of criteria that are not found in comparable international instruments or in the rules of procedure of the respective treaty bodies with regard to communications. These criteria relate to communications that are manifestly ill-founded or obviously politically motivated; and the questions of prior occurrence and compliance with principles of objectivity.

20. Both alternatives also incorporate the issue of sufficient substantiation of a claim. Insufficient substantiation is not addressed in the first OP as a criterion of admissibility but is addressed in the rules of procedure of the Human Rights Committee.[17] Rule 90 (b) requires, among other admissibility criteria, that a claim be submitted "in a manner sufficiently substantiated". The Human Rights Committee has noted that "although an author does not need to prove the alleged violation at the admissibility stage, he must submit sufficient evidence substantiating his allegation for purposes of admissibility".[18] Where a claim is not substantiated for purposes of admissibility, the Human Rights Committee has held communications inadmissible under rule 90 (b).[19]

21. Comparable instruments divide admissibility criteria into two groups, indicating the different stages at which a claim may be declared inadmissible. These two groups of criteria are clustered into more than one article, and within articles into paragraphs.

22. Certain criteria of inadmissibility, in particular anonymity, abuse of the right of submission and incompatibility with the provisions of the instrument, make a communication inadmissible *prima facie*. These are the first issues to be examined by a treaty body when it receives a communication. Communications which meet any of these criteria of inadmissibility are not considered further. In particular, they are not brought to the attention of the State party concerned.

23. Article 3 of the draft OP addresses the question of anonymity. The criteria of incompatibility and abuse of the right of submission are contained in article 4, alternative 1, subparagraphs 2 (i) and (ii), and alternative 2, subparagraphs (i) and (ii). In both alternatives, the two criteria are assembled under a chapeau which indicates *prima facie* inadmissibility. Three existing instruments[20] contain these two elements in language basically identical to the language contained in both alternatives of article 4 of the draft OP. The criteria in the three existing instruments are presented under a chapeau which states that "the Committee shall consider inadmissible any communication ... which ...", whereas article 4 (alternative 1) of the draft OP requires the Committee to *declare* a communication inadmissible. CERD has no comparable provision.

24. While alternative 1 of article 4 states that the Committee "shall not declare a communication admissible unless it has ascertained ...", the four existing instruments have a common chapeau to the domestic remedies clause. This states that a Committee "shall not consider any communication ... unless it has ascertained ...".[21] This formulation indicates the distinction between *prima facie* inadmissibility and a Committee's active assessment of whether the information available justifies the examination of a communication on its merits. Alternative 2, grouping all admissibility criteria under one chapeau, does not distinguish between *prima facie* inadmissibility and inadmissibility following the Committee's examination of certain criteria.

25. Existing instruments distinguish between factors that cause *prima facie* inadmissibility, on the one hand,[22] and factors that must be examined in the light of information received, on the other, in order to determine the admissibility of a communication. The latter factors include the exhaustion of domestic remedies and the examination of the communication by another procedure of international investigation or settlement.[23] Examination of these two criteria are preconditions for a declaration of admissibility, which precedes the examination on the merits.

26. The draft OP incorporates the criterion of exhaustion of domestic remedies in alternative 1, paragraph 1, and alternative 2, paragraph (iv), of article 4. While the two alternatives are identical in content, they have different chapeaux, in accordance with the different drafting styles.

27. After the hurdles of anonymity, abuse of the right of submission and incompatibility with the provisions of the Conventions have been cleared,[24] Committees bring the communication to the attention of the State party that is alleged to have violated a treaty for explanations, including information on any remedy that may have been taken.[25] Subsequently, the information submitted by the complainant(s) and the State party forms the basis for the treaty body's decision of admissibility or inadmissibility, which precedes consideration of the merits of the communication.

28. After several years' practice of joining consideration of admissibility and consideration of merits, the Human Rights Committee decided at its sixtieth session, in 1997, that, as a basic rule, it would join the consideration of

admissibility and merits of communications in all cases.[26] It amended its rules of procedure accordingly.

29. In the two alternatives of article 4 of the draft OP, the sequence in which the admissibility criteria are listed diverges from existing procedures and from the sequence in which these criteria operate in practice.

30. Alternative 1 addresses first, in paragraph 1, the requirement of the exhaustion of domestic remedies, which is to be ascertained by the Committee before declaring a communication admissible. Paragraph 2 combines various criteria leading to *prima facie* inadmissibility[27] and criteria which have to be ascertained by the Committee on the basis of information available to it.

31. Alternative 2 combines under the same chapeau *prima facie* inadmissibility criteria with criteria requiring the Committee's active examination based on information received.

32. Alternative 1 requires the Committee not to declare a communication admissible unless the issue of the exhaustion of domestic remedies has been examined. Alternative 2 states that a communication shall be inadmissible where domestic remedies have not been exhausted. The chapeaux of existing instruments state that the Committees shall not *consider* communications unless they have ascertained that domestic remedies have been exhausted or that this rule should not apply. With the joining of the consideration of admissibility and merits, as is now the rule in the Human Rights Committee, the State party is requested to submit written explanations or statements relating to both aspects of a communication. Only in exceptional cases will the Committee request a State party to address admissibility only.[28]

33. The two alternatives of article 4 contain a number of exceptions or qualifications to the general rule that available domestic remedies must be exhausted before a Committee can consider a complaint, including where remedies are unreasonably prolonged, or unlikely to bring effective relief (para. 1 of alternative 1 and para. (iv) of alternative 2). These exceptions and qualifications are also contained in existing instruments. Exhaustion of "available domestic remedies" unless where their "application is unreasonably prolonged" is covered.[29] "Unlikely to bring effective relief" is also covered.[30] The MWC[31] explicitly gives the Committee the responsibility to determine whether exception from the rule is justified ("this shall not be the rule where, in the view of the Committee ..."). The exhaustion of domestic remedies in existing procedures was discussed in the comparative summary.[32]

34. A number of exceptions or qualifications to the general rule which are contained in article 4, alternatives 1 and 2, are not found in existing instruments. These include the requirement that domestic remedies be "legal"; the requirement of exhaustion of domestic remedies in accordance with generally recognized rules of international law; and the requirement that the claimant demonstrate the ineffectiveness of the remedies or that the application of the remedies has been unduly prolonged.

35. Article 4, alternative 1, subparagraph 2 (iv), and alternative 2, subparagraph (v), elaborate factors of inadmissibility of a communication for temporal reasons – that is, that it relates to facts that occurred before the entry into force of the Protocol for a State party concerned. Such a communication would be admissible if the facts continued after the entry into force of the Protocol. As was noted in the comparative summary,[33] none of the existing procedures contains an explicit criterion that would make a communication inadmissible for temporal reasons. The comparative summary notes the current practice of the Human Rights Committee with regard to inadmissibility *ratione temporis*.[34] In this regard, the admissibility criterion applied by the Human Rights Committee is whether the events in question have, since the entry into force of the Optional Protocol, had persistent *effects* (emphasis added) which in themselves constitute violations of the Covenant.[35]

36. Article 4, alternative 1, subparagraph 2 (v), and alternative 2, subparagraph (vi), incorporate an inadmissibility criterion which aims to avoid duplication of procedures by declaring inadmissible communications where the same matter has been examined previously under another procedure of international investigation or settlement. This criterion can be found in existing instruments. They declare that a communication shall not be considered by the Committee unless it has ascertained that "the same matter is not being examined under another procedure of international investigation or settlement".[36] CAT and MWC add inadmissibility when the same matter *has been* examined in such manner. The comparative summary discusses the simultaneous and subsequent consideration of the "same matter".[37] The alternatives of article 4 also preclude admissibility in the case of prior examination by the Committee itself, a situation not addressed under other procedures. An option excluding admissibility when the same matter has been *taken note of* under another procedure, contained in article 4, alternative 1, subparagraph 2 (v), and alternative 2, subparagraph (vi), is likewise not addressed under other procedures.

37. An admissibility criterion requiring compliance with principles of objectivity, including information on remedies

or reparation, is foreseen in article 4, alternative 1, paragraph 3, and alternative 2, subparagraph (vii). There is no comparable provision in existing instruments.

Article 5: Interim measures

38. Article 5 of the draft OP deals with interim measures which may be recommended or requested by the Committee at any time between the receipt of a communication and a determination on the merits.

39. The use of interim measures under existing procedures was discussed in the comparative summary.[38] While under other procedures such interim measures are not included in the body of the instrument, they are provided for in the rules of procedure of the treaty body concerned and are utilized in practice.

Article 6: Reference of communications to a State party

40. Article 6.1 and alternatives 1 and 2 deal with the presentation of a communication to the State party concerned for comments. Under the four existing procedures, communications are brought to the attention of the State party concerned subject to the absence of *prima facie* admissibility criteria. The reference of a communication to a State party concerned was discussed in the comparative summary.[39]

41. The opening phrase of article 6.1 ("Unless the Committee considers a communication inadmissible without reference to the State party concerned ...") has equivalents in existing procedures.[40] These articles, however, subject the reference of a communication to a State party to situations where *prima facie* admissibility criteria listed in the preceding article or paragraph[41] are absent. Article 6.1 of the draft OP provides grounds that govern the criteria to be applied by the Committee in its decision not to refer a communication to the State party. With the exception of CERD, existing procedures make it clear that only communications that fulfil specific admissibility criteria outlined in the relevant instrument are to be brought to the attention of the State party.

42. Article 6.1, alternative 1, of the draft OP exhibits greater similarities with CERD,[42] which states that "The Committee shall confidentially bring any communication referred to it to the attention of the State party ...", as it does not require that a communication meet *prima facie* admissibility criteria before being referred to the State party concerned. Alternatives 1 and 2 leave it to the Committee to decide whether a communication is to be referred to the State party: "The State party should be informed ..." (alternative 1) and "The Committee may bring any communication admitted by it ... to the attention of the State party ..." (alternative 2). It is to be noted that existing instruments require the Committees to bring communications to the attention of the relevant State party. Thus, in all four instruments, the formulation used is "... the Committee shall bring any communication ... to the attention of the State party ...". Article 6.1 of the draft OP uses the same formulation.

43. By article 6.1 and alternatives 1 and 2, the Committee would bring communications *confidentially* to the attention of the State party. Only CERD[42] has a similar confidentiality requirement. Reference is also made to the comparative summary,[43] in particular to the confidentiality of documents.[44] Since then, the Human Rights Committee has amended its rules of procedure concerning confidentiality. Under a new rule 96, the author of a communication and the State party concerned may now make public any submissions or information bearing on the proceedings unless the Committee has requested the parties to respect confidentiality. All working documents issued for the Committee are confidential unless the Committee decides otherwise. The Committees final decisions (views, decisions declaring a communication inadmissible, decisions to discontinue a communication) are made public. The name(s) of the author(s) is (are) disclosed unless the Committee decides otherwise.[45]

44. Article 6.1 and alternatives 1 and 2 foresee, in different formulations, that the identity of the claimant(s) will be protected when a communication is brought to the attention of the State party. Only CERD has a requirement according to which the "identity of the individual or groups concerned shall not be revealed without his or their express consent".[46] This is also discussed in the comparative summary.[47]

45. Article 6.2 of the draft OP determines the time-frame within which a State party is requested to provide information to the Committee, including any remedies taken. Identical formulations can be found in existing instruments,[48] whereby the first OP, CAT and MWC establish a six-month and CERD a three-month time-frame for such replies.

46. Article 6.3 of the draft OP foresees the Committee's role vis-à-vis the parties concerned in achieving a settlement of the matter during its consideration. Other existing procedures have no comparable provision.

Article 7: Consideration of communications

47. The first part of article 7.1 of the draft OP covers the Committee's consideration of a communication in the light of information made available to it by the claimant(s) and the State party. An almost identical formulation is contained in existing instruments.[49] The requirement that such information be limited to material available to the Committee in written form has an equivalent in the first OP.[50] The option that information be submitted to the Committee by or on behalf of the claimant(s) has an equivalent in CAT and MWC.[51] The provision in the second part of article 7.1 of the draft OP whereby the Committee may also take into consideration information from other sources provided that this is transmitted to the author of the communication and the State party concerned for comment is not contained in other instruments. The comparative summary discusses the question of information made available to Committees in the consideration of communications.[52] Either party may avail itself of information prepared by third parties (for example, *amicus curie* briefs) and make it part of its own submission, if it so wishes.

48. Article 7.2 of the draft OP requiring the Committee to hold closed meetings when examining communications has an equivalent in existing procedures.[53]

49. Article 7.2 *bis* of the draft OP, relating to the participation of the State party during the Committee's consideration of a communication and envisaging it offering oral and/or written submissions, has no comparable provision in existing instruments. Reference is made to the comparative summary,[54] which discusses the proceedings on the merits of a case under existing procedures and the participation of representatives during proceedings.[55]

50. Article 7.3 of the draft OP and its alternative address the conclusion of the consideration of a communication by the Committee through the adoption of views. In addition to forwarding such views and recommendations to the parties concerned, article 7.3 and its alternative refer to the adoption, by the Committee, of its views, "after examining a communication". Existing instruments state that the Committee shall forward its "views" to the State party concerned and to the individual; CERD refers to "suggestions and recommendations, if any".[56] In the practice of the treaty bodies, such views commonly contain recommendations of remedies a State party is expected to take following a Committee's finding of a violation. This is also discussed in the comparative summary.[57]

Article 8: Remedies for violations

51. Article 8 of the draft OP covers the last stage of a communications procedure – that is, the follow-up phase after the Committee's findings on the merits and issuance of its views on a communication. While there is no direct equivalent to article 8 in existing procedures, the treaty bodies ask a State party to take appropriate steps to remedy a violation, such as by providing adequate compensation for the violations found by the Committee. A time-frame within which Committees wish to receive from the State party information about the measures taken to give effect to the Committee's views is usually also provided. The comparative summary discusses the current practice of the treaty bodies with regard to views and follow-up.[58] The Human Rights Committee actively monitors compliance through its follow-up procedure.[59]

52. With regard to the provision of statements or explanations by a State party concerned, the different stages of such submissions may be noted: article 6.2 of the draft OP addresses the submission of explanations by the State party during the consideration of the merits of a communication; article 8.3 and alternative 1 cover follow-up after the Committee's adoption of views on a communication.

Article 9: Follow-up mechanism

53. Although existing instruments do not contain an equivalent to article 9 of the draft OP, the treaty bodies have developed the practice of following up on decisions taken with regard to specific communications. This was discussed in the comparative summary.[60] For example, the Human Rights Committee has introduced the mechanism of a Special Rapporteur for the Follow-Up on Views, which enables the Committee to evaluate State party compliance with its views.[61] The Special Rapporteur is called upon to ascertain "the measures taken by States parties to give effect to the Committee's views" (rule 95).[62] Since 1991, the Special Rapporteur has systematically requested follow-up information in respect of all views with a finding of a violation of the Covenant. Information on the Committee's follow-up activities are included in its annual report.[63]

Article 10: Inquiry procedure

54. Article 10 of the draft OP is comparable to article 20 of CAT. The opening clause of article 10.1 of the draft OP ("If the Committee receives reliable information") is

identical to article 20.1 of CAT. While article 10.1 continues by stating that the information would need to indicate "a serious and/or systematic violation by a State party to the Protocol of rights set forth in the Convention", article 20.1 of CAT requires that such information must appear to the Committee to "contain well-founded indications that torture is being systematically practised in the territory of a State Party". The concluding clause of article 10.1 of the draft OP is identical to that of article 20.1 of CAT.

55. Article 10.2 has its equivalent in articles 20.2 and 20.3 of CAT. The opening clauses are again identical, except that the draft OP refers to *reliable* information whereas CAT refers to *relevant* information available to the Committee as the basis upon which the Committee may designate one or more of its members to make an inquiry and to report urgently to the Committee. This procedure is also foreseen in article 10.2, but without the qualifying clause contained in CAT (art. 20.2) that such designation occur "if [the Committee] decides that this is warranted". CAT requires its designated members to make a *confidential* inquiry, whereas article 10.2 foresees that an inquiry would be conducted *with the consent of the State party*. In article 20.3, CAT states that for inquiries made in accordance with article 20.2, the Committee "shall seek the cooperation of the State party concerned". Article 20.3 also foresees a visit to the territory "in agreement with the State party", a procedure envisaged in the last sentence of article 10.2 of the draft OP. The "where warranted" clause that opens the last sentence has an equivalent in article 20.2 of CAT. Under CAT, however, this clause refers to the designation of Committee members for the purpose of conducting an inquiry, whereas in the case of draft article 10.2, the clause refers to a visit to the territory of the State party.

56. Article 10.3 of the draft OP is comparable to article 20.4 of CAT. The content of both articles is identical except that article 10.3 refers, in an abbreviated form, to the findings "of such an inquiry" while CAT article 20.4 refers to the findings "of its member or members submitted in accordance with paragraph 2 of this article". A second difference is that article 10.3 refers to the Committee's "comments and recommendations". CAT article 20.4 refers to the Committee's "comments or suggestions which seem appropriate in view of the situation".

57. Article 10.4 of the draft OP foresees the submission, after the Committee's issuance of its findings, of the State party's observations to the Committee. While there is no comparable provision in CAT, the rules of procedure of the Committee against Torture[64] cover this matter. Rule 83.1 deals with the transmission of the Committee's findings to the State party, as established in article 20.4. Rule 83.2 states that "the State party concerned shall be invited to inform the Committee within a reasonable delay of the action it takes with regard to the Committee's findings and in response to the Committee's comments or suggestions".[64]

58. Article 10.5 of the draft OP is comparable to the first sentence of article 20.5 of CAT. While article 10.5 refers to the confidential conduct of "such an inquiry", article 20.5 of CAT goes into greater detail and states that "all the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential". While the confidential nature of the proceedings is emphasized in CAT ("shall be"), article 10.5 of the draft OP foresees that such an inquiry "would be conducted confidentially". Both articles require that at all stages of the proceedings the cooperation of the State party "shall be sought". Article 10.5 of the draft OP refers to the *consent* and cooperation of the State party, whereas CAT refers to the *cooperation* of the State party.

Article 11: Measures taken and follow-up

59. Article 11 of the draft OP has no comparable equivalent in CAT or in the rules of procedure of the Committee against Torture.

Article 12: Effective exercise of the right to submit communications

60. Article 12 of the draft OP and its alternative formulations have no comparable provision in existing instruments. The emphasis in article 12 (c) of the draft OP on cooperation between a State party and the Committee in proceedings under the Protocol is reflected in the practice of other treaty bodies. For example, the Human Rights Committee has noted that "the procedure established under the Optional Protocol aims at helping victims rather than condemning States parties for violations of the Covenant. The Committee therefore welcomes the early cooperation by States parties in finding solutions to human rights problems".[65]

Article 13: Annual report

61. Article 13 of the draft OP was adopted *ad referendum* by the Working Group. It has an identical equivalent in the first OP[66] and a comparable provision in CERD.[67] A similar provision can be found in CAT,[68] covering all of the

Committee's activities, including those under articles 20 and 22.

Article 14: Publicity

62. Existing instruments do not have a provision comparable to article 14 of the draft OP, although a similar provision relating to a substantive treaty is to be found in the Convention on the Rights of the Child.[69] The rules of procedure of the three treaty bodies underline the desirability of publicity for the procedures and the work of the Committees in this regard.[70]

Article 15: Rules of procedure

63. Existing instruments refer to the power of the treaty bodies to establish their own rules of procedure.[71] While the first Optional Protocol to the International Covenant on Civil and Political Rights does not address separately the Committee's power to establish its rules of procedure when acting under the OP, it may be noted that the Covenant and the first OP were adopted simultaneously and opened for signature, ratification and accession through the same resolution of the General Assembly.[72] The Convention on the Elimination of All Forms of Discrimination against Women, however, has been in force since 1981.

Article 16: Meeting time

64. The four human rights instruments considered contain no provisions concerning the meeting time of the relevant treaty body for the purposes of discharging all its responsibilities, including those with respect to communications and/or inquiry procedures. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is unique among the international human rights treaties in containing a limitation on the meeting time for its treaty body.[73] In view of the constraints caused by this limitation, a process of amending the treaty is under way to provide a legal basis for the Committee to be allocated meeting time commensurate with its functions. At this point, the Committee has been given six weeks' annual meeting time by the General Assembly, plus two weeks annually for its pre-session working group. The comparative summary outlines the average meeting time allocated by the treaty bodies to the discharge of their functions under the complaints/inquiry procedures.[74]

Article 17: Ratification procedure

65. Article 17 of the draft optional protocol follows article 8 of the first OP very closely. Article 17.1, however, is formulated more extensively than article 8.1, enabling States that have signed, acceded to or ratified the Convention also to sign the Protocol. By article 8.1, the first OP is open for signature by States that have signed the International Covenant on Civil and Political Rights. The Covenant and the first OP were adopted on the same day. The formulation contained in article 8.1 allowed States that signed the Covenant to sign the first OP at the same time.

66. It may also be noted that, while the usual formulation for a clause such as that contained in article 17.1 of the draft OP is "... any State which has signed, ratified or acceded to ...", article 17.1 of the draft OP uses the wording "... signed, acceded to or ratified ...".

67. The responsibilities of the Secretary-General as depository of the treaty, which are contained in articles 8.5 and 13 of the first OP, are combined in one article (article 23) in the draft OP.

Article 18: Entry into force

68. Article 18 of the draft optional protocol is comparable to article 9 of the first OP. As regards the number of instruments of ratification required for entry into force, the first OP, CERD and MWC require ten such instruments and CAT five.[75]

Article 19: Federal States

69. A formulation comparable to article 19 of the draft OP can be found in the International Covenant on Civil and Political Rights[76] and the first OP.[77] These have an identical article stating that "the provisions of the present Covenant/Protocol shall extend to all parts of federal States without any limitations or exceptions". It will be recalled that the Covenant and the first OP were adopted in 1966, prior to the adoption of the 1969 Vienna Convention on the Law of Treaties. This Convention, which entered into force in 1980, provides in its article 29 that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".[78] It thereby establishes a presumption of application of treaties to the entire territory of a Contracting State. This presumption is expressly confirmed by article 19

of the draft OP. CERD, CAT, MWC and CEDAW itself have no such provisions.

Article 20: Reservations

70. There are no provisions in the four existing instruments comparable to the formulations contained in article 20 of the draft OP and its alternative. The first OP is silent on the question of reservations and none of the other instruments addresses the question of reservations in the context of the communications procedure. The comparative summary gives an overview of the current practice of the treaty bodies with regard to reservations to their communications procedures.[79] With regard to the inquiry procedure set out in article 20 of CAT, article 28 of CAT contains a so-called "opt-out" provision. This provision offers a State party the option upon ratification of, or accession to, the Convention to make a declaration that it does not recognize the competence of the Committee to initiate an inquiry in accordance with article 20. An "opt-out" may be withdrawn at any time by notification to the Secretary-General.[80] As of 8 December 1997, 11 of the 104 States parties to CAT had made a declaration that they do not recognize the competence of the Committee under article 20.

Article 21: Amendments to the Protocol

71. Article 21 is identical to article 11 of the first OP and to article 51 of the International Covenant on Civil and Political Rights. MWC also has an identical article (art. 90), but adds time-frames for its operation. First, requests for revisions may be made *after five years* from the entry into force of the Convention,[81] and secondly, a four-months' time-frame is given for receiving a favourable reply from one third of the States parties with respect to a conference to consider the proposed amendments.[82] CAT[83] establishes that any amendment adopted by the majority of the States parties be submitted by the Secretary-General for acceptance to *all the States parties*, as opposed to the General Assembly, as is the case in the International Covenant on Civil and Political Rights and the first OP. The procedure for a revision of CERD[84] is identical to the CEDAW revision procedure.[85] Accordingly, a request for a revision may be made at any time by a State party by means of a written notification to the Secretary-General. The General Assembly is then called upon to decide upon the steps, if any, to be taken in respect of such a request. There are some minor drafting differences between article 21 of the draft OP and article 11 of the first OP.

Article 22: Denunciation

72. Article 22 of the draft OP is identical to article 12 of the first OP, except for some minor variations. For example, article 22.1 uses the words "can denounce this Protocol", whereas article 12 states "may denounce the present Protocol". The first OP specifies that denunciation does not apply to any communication *submitted under article 2* before the effective date of denunciation.

Articles 23 and 24: Depository functions of the Secretary-General

73. Articles 23 and 24 of the draft OP are largely identical to articles 13 and 14 of the first OP. The chapeau of article 23 reiterates the language of article 25.1 of CEDAW when it refers to *all* States. The draft OP refers to entry into force of the Protocol, entry into force of amendments, and denunciations in the same subparagraph, whereas in the first OP these issues are contained in two separate subparagraphs. Article 24 reflects article 30 of CEDAW, which states that the six language texts are equally authentic.

Notes

1 *Official Records of the Economic and Social Council, 1997, Supplement No. 7* (E/1997/27), chap. I, sect. C.2.

2 Ibid., *1997, Supplement No. 7* (E/1997/27), annex III, appendix I.

3 General Assembly resolution 2200 A (XXI), annex.

4 General Assembly resolution 39/46, annex.

5 General Assembly resolution 2106 A (XX), annex.

6 General Assembly resolution 45/158, annex.

7 Art. 1 of the first OP, art. 22.1 of CAT, art. 14.1 of CERD and art. 77.1 of MWC.

8 E/CN.6/1997/4, paras. 20 and 21.

9 Last sentence of art. 1 of the first OP, art. 22.1 of CAT, art. 14.1 of CERD and art. 77.1 of MWC.

10 Art. 1 of the first OP, art. 22.1 of CAT, art. 14.1 of CERD and art. 77.1 of MWC.

11 E/CN.6/1997/4, paras. 44-48.

12 E/CN.6/1997/4, paras. 47 and 48.

13 Art. 1 of the first OP, art. 22.1 of CAT, art. 77.1 of MWC and art. 14.1 of CERD.

14 Art. 22.5 (b) of CAT, art. 14.7 (a) of CERD and art. 77.3 (b) of MWC.

15 Art. 3 of the first OP, art. 22.2 of CAT, art. 14.6 (a) of CERD and art. 77.2 of MWC.

16 Art. 2.

17 CCPR/C/3/Rev.5.

18 *Official Records of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), vol. I, para. 478; para. 479 provides examples of cases declared inadmissible, *inter alia*, for lack of substantiation of the claim or failure to advance a claim.

19 The Human Rights Committee has used article 2 of the first OP in conjunction with rule 90 (b) to dismiss communications that are manifestly ill-founded, although such an admissibility criterion is not contained in the first OP. The Committee has also used the formula that the author has failed to advance a claim within the meaning of article 2 of the Optional Protocol to dismiss at the admissibility stage communications that would inevitably fail at the merits stage.

20 The first OP (art. 3), CAT (art. 22.2) and MWC (art. 77.2).

21 Art. 5.2 of the first OP, art. 22.5 of CAT, art. 14.7 (a) of CERD and art. 77.3 of MWC.

22 That is, anonymity, abuse of the right of submission and incompatibility with the provisions of the instrument, contained in art. 3 of the first OP, art. 22.2 of CAT and art. 77.2 of MWC.

23 See arts. 2 and 5.2 (a) and (b) of the first OP, art. 22.5 (a) and (b) of CAT, art. 14.7 (a) of CERD and art. 77.3 (a) and (b) of MWC.

24 The Human Rights Committee designates one of its members as Special Rapporteur on new communications who processes new communications as they are received, either dismissing them as inadmissible (e.g., because of anonymity) or transmitting them to States parties requesting information or observations relevant to the question of admissibility. The Special Rapporteur may also recommend to the Committee that a communication be declared inadmissible without forwarding it to the State party. See *Official Records of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), vol. I, para. 466. See also the comparative summary (E/CN.6/1997/4), para. 60. The Committee against Torture appoints a case rapporteur for new cases.

25 Art. 4.1 of the first OP, art. 22.3 of CAT, art. 14.6 (a) of CERD and art. 77.4 of MWC.

26 See *Official Records of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), vol. I, paras. 470 and 471.

27 For example, abuse of the right of submission and incompatibility with the provisions of the Convention.

28 *Official Records of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), vol. I, para. 471.

29 See art. 5.2 (b) of the first OP, art. 22.5 (b) of CAT, art. 14.7 (a) of CERD and art. 77.3 (b) of MWC.

30 See art. 22.5 (b) of CAT and art. 77.3 (b) of MWC.

31 Art. 77.3 (b).

32 E/CN.6/1997/4, paras. 28 and 29.

33 E/CN.6/1997/4, paras. 32-35.

34 Ibid.; see also *Official Records of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), vol. I, paras. 483 and 484.

35 Ibid., para. 483.

36 Art. 5.2 (a) of the first OP, art. 22.5 (a) of CAT and art. 77.3 (a) of MWC.

37 E/CN.6/1997/4, para. 27.

38 E/CN.6/1997/4, paras. 67-70.

39 Ibid., paras. 42 and 43.

40 Art. 4.1 of the first OP, art. 22.3 of CAT and art. 77.4 of MWC.

41 That is, anonymity, abuse of the right of submission and incompatibility with the provisions of the Convention.

42 Art. 14.6 (a).

43 E/CN.6/1997/4, paras. 71-83.

44 Ibid., para. 76.

45 *Official Records of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), vol. I, para. 454.

46 Art. 14.6 (a).

47 E/CN.6/1997/4, paras. 71-83, in particular paras. 73 and 81-83.

48 Art. 4.2 of the first OP, art. 22.3 of CAT, art. 14.6 (b) of CERD and art. 77.4 of MWC.

49 Art. 5.1 of the first OP, art. 22.4 of CAT, art. 14.7 (a) of CERD and art. 77.5 of MWC.

50 Art. 5.1.

51 Art. 22.4 of CAT and art. 77.5 of MWC.

52 E/CN.6/1997/4, paras. 85-88, in particular para. 88.

53 Art. 5.3 of the first OP, art. 22.6 of CAT and art. 77.6 of MWC.

54 E/CN.6/1997/4, paras. 49-55.

55 Ibid., para. 84.

56 Art. 5.4 of the first OP, art. 22.7 of CAT, art. 14.7 (b) of CERD and art. 77.7 of MWC.

57 E/CN.6/1997/4, paras. 61-66, in particular para. 61.

58 Ibid.

59 See *Official Records of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), vol. I, para. 517.

60 E/CN.6/1997/4, paras. 63-65.

61 *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), vol. I, para. 424.

62 See "Rules of procedure of the Human Rights Committee" (CCPR/C/3/Rev.5).

63 See *Official Records of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), vol. I, chap. VIII (Follow-up activities under the Optional Protocol).

64 CAT/C/3/Rev.2.

65 *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), vol. I, para. 419.

66 Art. 6.

67 Art. 14.8.

68 Art. 24.

69 General Assembly resolution 44/25, annex, art. 42.

70 See also the comparative summary (E/CN.6/1997/4), para. 91.

71 Art. 39.2 of the International Covenant on Civil and Political Rights, art. 18.2 of CAT, art. 10.1 of CERD and art. 19.1 of the Convention on the Elimination of All Forms of Discrimination against Women.

72 General Assembly resolution 2200 (A) (XXI) of 16 December 1966.

73 General Assembly resolution 34/180, annex, art. 20.1.

74 E/CN.6/1997/4, paras. 93 and 94.

75 Art. 9.1 of the first OP, art. 14.9 of CERD, art. 77.8 of MWC and art. 22.8 of CAT.

76 Art. 50.

77 Art. 10.

78 United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 332.

79 E/CN.6/1997/4, paras. 36-41.

80 Art. 28.2.

81 Art. 90.1.

82 Ibid.

83 Art. 29.1.

84 Art. 23.

85 Art. 26.